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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 93M-303  
31612

In re Applications of	)	MM DOCKET NO. 93-94 ✓
SCRIPPS HOWARD BROADCASTING COMPANY	)	File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV	)	
Baltimore, Maryland	)	
and	)	
FOUR JACKS BROADCASTING, INC.	)	File No. BPCT-910903KE
For a Construction Permit for a New	)	
Television Facility on Channel 2	)	
at Baltimore, Maryland	)	

MEMORANDUM OPINION AND ORDER

Issued: May 25, 1993; Released: May 26, 1993

Background

1. This is a ruling on a Petition For Certification filed on April 8, 1993, by Four Jacks Broadcasting, Inc. ("Four Jacks"). An Opposition To Request To Certify Application For Review was filed by Scripps Howard Broadcasting Company ("Scripps Howard") on April 19, 1993. The Mass Media Bureau ("Bureau") filed its Opposition To Request To Certify Application For Review on April 19, 1993.

2. Four Jacks requests certification to the Commission under the Commission's rule on the question of the legal sufficiency of the Hearing Designation Order (DA 93-340), released on April 1, 1993 ("HDO"). Specifically, Four Jacks contends that the Bureau erred in setting this case for a hearing without designating an issue "to determine the impact of anticompetitive misconduct on the part of a subsidiary of WMAR - TV" and the failure on the part of Scripps Howard "to report adjudicated findings of such misconduct." Four Jacks seeks Commission consideration of such allegations on the conclusive question of Scripps Howard's basic qualifications to remain a Commission licensee." The relevant text of the rule is as follows:

Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the Presiding Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially

expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable....

47 C.F.R. §1.115(e)(3).

### Facts

3. The facts for which an HDO issue is sought were previously addressed by the Bureau in connection with a Petition To Deny a renewal of two other stations licensed to Scripps Howard, i.e., Stations KUPL and KUPL-FM in Portland, Oregon. The Petition To Deny had been filed, and later withdrawn, by Pacific West Cable Television ("Pacwest"). The underlying offensive conduct that is allegedly attributable to Scripps Howard arose out of a lawsuit and related special jury verdicts in a civil action entitled Pacific West Cable Co. v. City of Sacramento, 672 F.Supp. 1322 (E.D. Cal. 1987). The verdicts were found against the municipal defendants.<sup>1</sup> Pacwest lost out to Sacramento Cable Television ("SCT") for the Sacramento cable franchise. The jury found that the process whereby the municipality selected SCT involved the use of a scheme to trade a monopoly franchise in exchange for illegal payoffs, in kind services, and increased campaign contributions. Id. at 1338, 1349-50. The connection between Scripps Howard and the lawsuit is through SCT which is a wholly owned subsidiary of Scripps Howard Cable Company of Sacramento, Inc., which in turn is owned and controlled by Scripps Howard.<sup>2</sup>

4. Pacwest filed a Petition to Deny with the Commission on November 20, 1990, arguing against the renewal applications of Stations KUPL and KUPL-FM.<sup>3</sup> The Petition was based on the alleged illegal activities of SCT that

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<sup>1</sup> The only defendants in the civil action were the City of Sacramento and the County of Sacramento. Id. Neither Scripps Howard nor any of its subsidiaries was a party to the action.

<sup>2</sup> The municipality first selected United Tribune Cable of Sacramento as "tentative franchisee." Public hearings were held but when the franchise was offered to it, United Tribune declined to accept the offer. It was after a second request for proposals was made in 1983 that Pacwest was formed to compete with Cablevision of Sacramento which had Scripps Howard as one of its partners. In 1985, Scripps Howard succeeded to the interests of two other partners and the name of the entity was changed to SCT [Sacramento Cable Television]. See 672 F. Supp. at 1324-25 and fn.3.

<sup>3</sup> Also, in 1987, an informal objection to renewals of Scripps Howard broadcast properties in Cincinnati, Cleveland and Michigan was filed by Weststar Communications because Scripps Howard had failed to disclose pending lawsuits. (See opposition at Exh.A.) In that proceeding, the Video Services Division found that Scripps Howard was under no obligation to report the Sacramento civil action since it was not a party to that case. Nor was it required to disclose later civil litigation based on those allegations which was settled and which was not finally adjudicated against Scripps Howard.

were found by the special jury verdict in the Sacramento action. Pacwest also asserted the same alleged wrongdoings in a Petition to Deny the assignment of WMAR-TV to Scripps Howard. Ultimately, Pacwest withdrew its Petition to Deny against the KUPL stations and, in a letter to the interested parties dated July 27, 1992, the Chief of the Bureau's Video Services Division dismissed the Pacwest petition and granted the renewal of the stations. The letter stated in parts pertinent:

The Petition to Deny alleges that the licensee's cable television subsidiary engaged in anticompetitive behavior. Pacwest also raised these allegations in a civil suit, which was settled with no adjudicated findings. In June 1992, Pacwest filed a Request for Dismissal of the Petition to Deny. ---.

The Petition to Deny challenges the basic character qualifications of the licensee, but our review of these allegations finds no substantial and material question of fact as to whether grant of the KUPL/KUPL-FM renewal applications would be in the public interest. [citations omitted.]

To the extent that Pacwest's Petition to Deny in this proceeding cross-references allegations made in its Petition for Reconsideration of Scripps Howard's acquisition of Station WMAR-TV, Baltimore, we also find that those matters do not adversely impact the grant of the KUPL/KUPL-FM renewal applications. However, we make no finding as to the impact of those allegations on Station WMAR-TV. Those allegations will be resolved in the context of the WMAR-TV proceeding.

(See letter dated July 27, 1992, from Larry D. Eads, Chief, Audio Services Division to Donald P. Ziefang and Sol Shildhouse at Exhibit B to Four Jack's Request For Certification.)

#### Discussion

5. Four Jacks focuses on the language "will be resolved in the context of the WMAR-TV proceeding" for asserting that the HDO had erroneously omitted an issue in this renewal proceeding based on the Pacwest allegations. What is overlooked by Four Jacks is the fact that the issue had been raised in the proceeding involving the assignment of the license of WMAR-TV from Gillette Broadcasting of Maryland, Inc. to Scripps Howard. The Chief, Video Services Division, accepted Pacwest's request to withdraw a request for reconsideration of the assignment, which had included the allegations of wrongdoing by SCT in Sacramento. The Bureau granted the withdrawal but noted in its letter that the matters were "fully considered" and concluded that "there are no substantial and material questions of fact that would warrant any further inquiry." (See letter dated February 22, 1991, from Clay C. Pendarvis, Chief, Television Branch, Video Services Division to Sol Shildhouse, Attachment to the Bureau's Opposition.)

6. Based on the facts presented by all parties relating to the question of certification, it appears that the Commission has previously

considered the matters raised by Pacwest before the renewal application was set for a hearing. The Bureau represents that when it sent its letter of July 27, 1992, which contained the ambiguous language, the Audio Services Division was unaware of the fact that the staff had already ruled in its letter of February 22, 1991, that there was no substantial question to resolve. In that regard, the letter of February 22, 1991, is a prehearing decision. In fact, if the issue were added in the HDO, the Bureau would have had to explain in a reasoned decision why it was reversing its earlier 1991 determination that there was no substantial issue that required a hearing. But because it was made before and without any consideration of the HDO it is not the law of the case. Compare the Presiding Judge's ruling in Memorandum Opinion and Order, FCC 93M-205, released April 28, 1993 (Bureau's determination in HDO is the law of the case until Commission appeal). Cf. Ft. Collins Telecasters, 103 F.C.C. 2d 978, 983-84 (Review Board 1986) (only where there is full consideration of an issue in a designation order is the trial judge and the Review Board without jurisdiction to consider it).

7. In the final analysis, however, the request for certification must be denied because Four Jacks has not met the criteria for certification.<sup>4</sup> The Commission's rule on certification specifically contemplates that a review of the legal sufficiency of an HDO shall "be deferred" until there is an appeal to the Commission from an intermediate review by the Review Board. 47 C.F.R. §1.115(e)(3), supra. And there appears to be no controlling issue of law involved on which there is a substantial ground for a difference of opinion that warrants certification from the Presiding Judge to the Commission while the case is in litigation. Four Jacks has not even addressed the question of "controlling issue of law" and there are no assertions that the Bureau's determination in 1991 was not a reasoned decision. Nor is there any showing on how the certification would "materially expedite" the renewal proceeding.

8. It is concluded that Four Jacks has not established a sufficient ground to certify an issue to the Commission on whether the designation order is erroneous for failing to include issues against Scripps Howard to determine the impact of the alleged anticompetitive misconduct referred to above, and

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<sup>4</sup> This ruling is not a prejudgment of any petition to enlarge issues. See 47 C.F.R. §1.229. Only where a hearing designation order contains "precise instructions" that a particular issue is not to be tried in the hearing will a presiding judge be without authority to add the issue. Ft. Collins Telecaster, supra. at 982. But here there is no reference in the HDO to the Pacwest allegations.

the impact of a failure to disclose that misconduct, on the licensee's basic qualifications to hold a Commission license.<sup>5</sup>

ORDER

Accordingly, IT IS ORDERED that the Request To Certify Application For Review filed on April 8, 1993, by Four Jacks Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge.

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<sup>5</sup> The Consolidated Reply To Oppositions To Request To Certify Application For Review filed by Four Jacks on April 23, 1993, and the Consolidated Reply To Oppositions filed by Scripps Howard on April 26, 1993, have not been considered by the Presiding Judge and will be dismissed as unauthorized pleadings. See Mass Media Bureau's Motion To Dismiss Unauthorized Reply Pleadings filed on April 27, 1993. It is further noted that in an earlier ruling of the Presiding Judge in denying a Petition For Certification that had been filed by Scripps Howard, the Presiding Judge had acted before Scripps Howard had filed its Reply pleading, which pleading was neither seen nor considered before the ruling. See Memorandum Opinion And Order, FCC 93M-205, issued April 26, 1993. See also Order FCC 93M-306, issued May 24, 1993, granting the Bureau's motion and dismissing the unauthorized Reply pleadings.